U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 565-5330
(202) 565-5325 (FAX)

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DATE: 05/0 6/ 02

CASE NO: 1999-INA-129

In the Matter of

NEBIL G. ZARIF
Employer

on behalf of

LILANI ESPINA
Alien

Appearances: Dan E. Korenberg, Esq.
For Employer and Alien

Certifying Officer: Rebecca Marsh Day, Region IX

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Nebil G. Zarif's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that,

at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On January 4, 1995, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the California Employment Development Department ("EDD") on behalf of the Alien, Lilani Espina. (AF 245-46). The job opportunity was listed as "Cook/domestic". (AF 245). The job duties were described as follows:

> Plans menus, cook, bake and serve meals in private home for family members and guests. Plan and prepare weekly menu for employer's approval as per employer's requirements and guest lists; Prepare low sodium, low fat, non cholesterol, nutritionally balanced and aesthetically pleasing dietary meals and fancy foods, decorated according to occasion; Purchase foodstuff and supplies; Bake breads, pastries, pies and desserts; Carve, cook, season, boil, saute, steam, baste, stir meats, poultry and fish as per occasion; Prepare soybean meats, grain meats & vegetables on a daily basis; Decorate foods and party trays; Do seasonal cooking, such as preserving and canning fruits & vegetables; Set table; Serve foods & refreshments; Maintain kitchen and storage areas clean & hygienic; Wash dishes, pots, pans and utensils; Clean oven, refrigerator, freezer and kitchen appliances.

(Id.). The stated job requirements for the position, as set forth on the application, are a high school education plus two years experience in the job offered. Other special requirements were listed as "Must know how to prepare nutritionally balanced, low-sodium, low-fat vegetarian and international foods." (Id.).

The CO issued a Notice of Findings ("NOF") on June 27, 1997, proposing to deny certification. (AF 239-243). First, the CO found that the duties described by employer did not appear to constitute full-time employment in the context of employer's household and questioned whether the job was truly open to U.S. workers, citing 20 C.F.R. 656.3 and 656.20(c)(8). (AF 240-

41). The CO instructed the Employer to provide evidence to establish that the position as performed in the Employer's household clearly constitutes full-time employment and that the job has not merely been created for the alien. (AF 241-42). Second, citing 20 C.F.R. 656.20(c)(1) and 656.20(c)(4), the CO found that the Employer must document the ability to hire a full-time cook at the wage offered of "$**XX.XX** per hour."[1] (AF 242-43).

The Employer submitted its rebuttal to the NOF on July 31, 1997, in the form of a brief by counsel, a signed affidavit by Employer, photographs of the Employer entertaining guests and excerpts from other alien labor certification applications for cooks where certification was approved. (AF 126-238). The Employer's counsel charged the NOF with being "written in boilerplate language" and argued that since the CO did not require "specific documentation, a statement from the employer would be sufficient evidence to satisfy the request." (AF 127). Employer stated that until 1992, the Employer resided with his former wife and children and had a staff of sixteen individuals working for him. Since his divorce, Employer stated that he has been using temporary, part-time individuals to do the cooking and household duties. (AF 134). The rebuttal statement listed the duties of the cook, along with a general schedule the cook would follow. Also, Employer submitted dates of past social events hosted by Employer, along with the number of people who attended each event. Employer stated that no children reside in the household. Further, Employer stated that the general housekeeping duties will not be performed by the cook. Employer stated that in the past the general housekeeping duties were performed by either himself or various part-time individuals, however, Employer did not provide documentation of the these part-time housekeeper's services. (AF 140). Finally, Employer stated that he is a wealthy man with more than enough means to pay for a full-time cook at the offered wage of $12.16 per hour. Employer asserted that he would not submit his income tax return or discuss financial status "inasmuch as it is personal." (Id.).

The CO issued a Final Determination ("FD") on August 15, 1997, denying certification. (AF 122-125). The CO found that the rebuttal failed to provide substantiation for the assertion that the job is a full-time position for a domestic cook during the schedule indicated. (AF 124). The CO noted that when taking under consideration that all meal preparation will be for one individual and that social events do not occur daily, "the rebuttal has not accounted for a full-time cook position during the hours described on the application." (Id.). In addition, the CO found that the Employer did not provide any evidence of an assignment of a tax identification number. For these reasons, the CO stated that she could not find that the cook position is full-time or that the labor certification position is truly open to any U.S. worker. (AF 125).

The Employer filed a Motion to Reconsider and a Request for Review on September 17, 1997. (AF 2-121). The CO denied the Request for Reconsideration on August 10, 1998, and the file was forwarded to this Board of Alien Labor Certification Appeals ("BALCA") for review. (AF 1).

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[1]The offered wage is $12.16 per hour. (AF 245).

Discussion

In *Carlos Uy, III, 1997-INA-304* (Mar. 3, 1999) (*en banc*), the Board held that a CO may properly invoke the *bona fide* job opportunity analysis authorized by 20 C.F.R. 656.20(c)(8) if the CO suspects that the application misrepresents the position offered as skilled rather than unskilled labor in order to avoid the numerical limitation on visas for unskilled labor. When the CO invokes section 656.20(c)(8), however, administrative due process mandates that he or she specify precisely why the application does not appear to state a bona fide job opportunity. It is the employer's burden following the issuance of an NOF to perfect a record that is sufficient to establish that a certification be granted. The Board in *Uy* rejected the employer's contention that where a CO does not request a specific type of document, an undocumented assertion must be accepted and certification granted.

This matter falls squarely within our holding in *Uy*. Therefore, we hold as stated in *Uy* that:

> In view of the lack of clarity in the NOF, the inadequacy of the Final Determination, and today's clarification of the "totality of the circumstances" test when the CO raises the issue of *bona fide* job opportunity in an application involving a Domestic Cook, we remand this matter for issuance of a supplemental NOF. This NOF will provide Employer an opportunity to submit evidence of any kind to bolster his contention that he has a bona fide job opportunity for a Domestic Cook. The CO shall than consider the existing record and any supplemental documentation submitted by Employer and issue a Final Determination. If the CO determines that labor certification should be denied, she must explain her rationale for that determination.

Slip. op. at 16-17.

Accordingly, this matter will be remanded for the issuance of supplemental NOF for reevaluation of the application consistent with the *en banc* decision in *Uy*. *See also Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (*en banc*) and *Elain Bunzel*, 1997-INA-481 (Mar. 3, 1999) (*en banc*). Employer shall answer any questions the CO may have about whether this is a bona fide job opportunity pursuant to section 656.20(c)(8), or Employer's ability to provide permanent, full-time employment pursuant to section 656.20(c)(4), or employer's ability to pay the wages of a domestic cook pursuant to section 656.20(c)(1).

Order

The Certifying Officer's denial of labor certification is hereby VACATED and the matter REMANDED for further development of the case.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California